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In the Supreme Court of the United States

OCTOBER TERM, 1977

HERBERT H. MCADAMS II, EXECUTOR OF THE ESTATE OF JOHN L. MCCLELLAN, ET AL., PETITIONERS

v.

ALAN MCSURELY and MARGARET MCSURELY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents' principal argument is that the Speech or Debate Clause provides immunity only when a Member of Congress engages in speech or voting, not when he engages in physical conduct. None of the judges of the court of appeals adopted that distinction; rather, all ten judges distinguished unconstitutional conduct (which they thought not to be covered by immunity) from merely improper conduct (which they thought the Speech or Debate Clause covers). Although we disagree with the court of appeals' conclusion, the court properly declined to embrace respondents' distinction between speech and conduct.

First, it is hard to take "conduct" out of the realm of immunity without denying to Congress the power to find information on which to base legislation. "Conduct"

could be outside the scope of the Speech or Debate Clause only if it were not an integral part of the legislative function. Yet, as this Court held in *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, investigations to discover facts are an integral part of the legislative process, and it cannot reasonably be denied that preliminary spadework is an essential part of any investigation. If investigations are protected by the Speech or Debate Clause, and if investigations—or, at least, effective investigations—necessarily involve some "conduct," then it must follow that respondents' simplistic distinction between speech and conduct is untenable.

Second, respondents' position would needlessly create the intractable problem of separating speech from conduct. Even "pure speech," such as publishing a newspaper, has a significant element of "conduct"; a newspaper may operate a printing plant employing hundreds of persons. In another context the Court held that money should be treated as speech because it is an essential precursor of speech. *Buckley* v. *Valeo*, 424 U.S. 1, 16-23. Similarly, preliminary investigation is an essential precursor of hearings and legislation. It is not worthwhile to attempt to separate "conduct" from "speech" in such situations, giving only one of them constitutional protection.

Third, respondents' position ignores *Doe* v. *McMillan*, 412 U.S. 306. The plaintiffs in *Doe* charged that Members of Congress had published private information in a committee report, and they sued, among other persons, the investigator who had secured the materials (412 U.S. at 309). This Court held that the Speech or Debate Clause shielded the act "of authorizing an investigation pursuant to which the subject materials were gathered" (*id.* at 313). The Court could have said that only the authorization—and not the actual gathering—was protected, but it did

not; it remanded the case for further proceedings with respect to the claim of dissemination alone, not with respect to any contention that the initial investigation was unprivileged. It found the investigator to be immune.

Moreover, although respondents argue (Br. 51-58) that an investigation is privileged only when conducted pursuant to a subpoena, there was no subpoena in *Doe*. That case, like this one, involved only a general legislative authorization, followed by investigation by employees of Congress. In this case, as in *Doe*, the investigation is protected by the Speech or Debate privilege.

We submit that the proper test does not distinguish speech from conduct. It requires, instead, an inquiry into whether the actions in question—whether speech or conduct—had a legislative purpose and were part of the legislative process. That is the test articulated in *Servicemen's Fund*.

2. Respondents' analysis of the difference between speech and conduct leads them to the rule that legislators and their aides may not "employ force against a citizen" (Br. 60). This is a substantially narrower standard than the speech-conduct distinction respondents employ elsewhere, and we do not disagree with that formulation of the rule. It follows from *Kilbourn* v. *Thompson*, 103 U.S. 168, and other cases that the employment of force is not part of the legislative process.

But the distinction, if put in this way, does not assist respondents. What happened here involved no force, and it is much more closely associated with speech than with forceful conduct. Judge Leventhal's opinion found potentially actionable behavior in the following events: (i) Brick *read* papers willingly supplied or made available to him by Ratliff, who was in possession of the papers

pursuant to court order; (ii) Brick took the written materials to Congress, where Senator McClellan *read* some of them and allegedly gave or *talked* about them to other persons; (iii) Ratliff did not *ask* the three-judge court for formal permission to show the papers and give copies of some to Brick, apparently believing (perhaps mistakenly) that he did not need to seek formal permission.

There were no arrests, no entries onto private property, no removal of original papers; nothing was done without the consent and cooperation of the custodian of the papers. The obtaining of the papers was no more forceful here than it was in *Doe*, and no more stealthy. Brick's behavior involved no more "conduct" than the issuance and service of the subpoena in *Servicemen's Fund*. If, as respondents argue, there is a continuum between privileged speech and unprivileged force, the facts of this case place it at or close to the speech end of that continuum.

3. Respondents emphasize the distinction between activities directly related to (or part of) the legislative process, which are privileged under the Speech or Debate Clause, and activities only peripherally related to legislation, which are not. This distinction, too, does not assist respondents. All ten judges of the court of appeals concluded that the investigation in which Brick was engaged was part of a legitimate legislative inquiry by the Subcommittee into matters about which legislation could be had (Pet. App. 17a-18a, 55a n. 3). Congress itself ratified that view when it cited respondents for contempt of Congress; the citation necessarily recognized that the Subcommittee was engaged in a proper inquiry and that respondents' refusal to comply with the subpoena—which called for production of many of the original documents

of which Brick had obtained copies—frustrated that inquiry. Brick's neglect to separate relevant from irrelevant documents among those Ratliff gave him was, at most, negligence in the execution of a legitimate legislative function.

Much of respondents' presentation relies on their belief that Senator McClellan and other persons desired to obtain information for illegitimate purposes, including blackmailing Drew Pearson (*e.g.*, Br. 10-20, 64-68). This is simply second-guessing the conclusion of Congress itself that the Subcommittee was engaged in a legitimate investigation. The more serious objection to respondents' argument, however, is that it requires an inquiry into the motives of a Senator and his staff in conducting an investigation that Congress authorized.

Nothing is better settled than that an excursion into motives is prohibited by the Speech or Debate Clause. "If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." *Servicemen's Fund, supra*, 421 U.S. at 508-509; see also *United States* v. *Johnson*, 383 U.S. 169, 180, 183; *Tenney* v. *Brandhove*, 341 U.S. 367, 377-378. Because of this inhibition, designed to secure the independence of Congress from judicial inquiry into claims of bad motive that are easy to make but difficult to refute, the propriety of legislative acts must be assessed objectively. Assessed objectively, Brick's conduct was part of a valid legislative inquiry.

But, respondents contend (Br. 51), "gathering information for a hearing" is not legislative at all. Respondents cite *Gravel* v. *United States*, 408 U.S. 606, 620, for this proposition. The passage of *Gravel* to which

respondents refer dealt with *Dombrowski* v. *Eastland*, 387 U.S. 82, in which the Court held that the Speech or Debate Clause did not pertain to involvement in an unconstitutional search by state officials. *Dombrowski* itself held that the Speech or Debate Clause created absolute immunity from liability for "taking over" the illegally seized documents for use by Congress, and therefore *Dombrowski* necessarily holds that gathering of information for use by Congress is part of the legislative process. To the extent the passage of *Gravel* to which respondents refer had some broader meaning, it was *dicta* that did not survive *Servicemen's Fund*.

4. Respondents assert (Br. 96-97) that we have misstated the record in arguing that no documents could have been disseminated to the Internal Revenue Service before all of the copies of respondents' papers were returned. But the record shows both that the copies of the papers taken by Brick were returned to state officials on August 14, 1968 (see Pet. App. 8a n. 13, 9a n. 15, 14a n. 25, 31a n. 59; A. 98),[1] and that the first exchange of documents between the Subcommittee and the Internal Revenue Service did not occur until August 1969 (A. 57-63). Respondents say that we have overlooked their contention (A. 65) that the "relationship between" the Subcommittee and the Internal Revenue Service was "generated" on March 5, 1969, but this contention is

[1]Respondents state (A. 12, 33, 67) that the originals and copies were returned to them on November 8, 1968. This is, however, quite consistent with our statement that the Subcommittee surrendered the copies to state officials on August 14, 1968. Respondents have not offered any evidence that would show that the Subcommittee had possession of the copies after August 14, and the general unsubstantiated denial (A. 56) is inadequate to create a disputed issue requiring a trial. Moreover, November 8, 1968, still is well before the date on which the Subcommittee and the Internal Revenue Service began to exchange documents.

irrelevant because respondents concede that they *received* the original documents and the copies taken by Brick on November 8, 1968 (A. 12, 33, 67). Even if an exchange of information took place as early as March 1969, it could not have included any of respondents' materials.

The earliest dates for any sort of discussions between the Subcommittee's staff and the Internal Revenue Service are August 28, 1968, and two dates in September 1968 (A. 66). These discussions began after the Subcommittee had surrendered its copies of respondents' papers. Moreover, the documents submitted by respondents themselves show that the preliminary discussions among staff did not culminate in exchanges of materials until 1969 (A. 59-63, 73-75).

The final difficulty with respondents' position is that nothing in the record tends to show that the copies of their documents were in fact disseminated to anyone outside the Subcommittee. Brick denied under oath that there had been dissemination (A. 97-98), and although respondents speculate that Brick might have been lying, they offer no support for that speculation. Respondents do not, for example, state that any person will testify that he saw copies of their papers; they do not state that they have been told by any person that he or she saw copies (or even heard of anyone who said that he did).

In other words, respondents want to engage in a fishing expedition. The Speech or Debate Clause was designed to prevent subjecting Members of Congress and their aides to discovery that has no other purpose than to explore in the hope that something might turn up; it is too late for respondents to explore their case in search of its existence. As Judge Leventhal concluded when dealing with another claim of dissemination, "[w]hen the court is confronted with something as unusual as an attempt to

sue Congressmen for participating in a 'public' distribution, the least plaintiffs must supply, before pressing any claim to discovery, is a concrete factual indication that there was indeed a 'public' distribution." *Doe* v. *McMillan*, C.A. D.C., No. 75-2016, decided July 29, 1977, rehearing denied, October 13, 1977, slip op. 3-4 (concurring opinion), petition for a writ of certiorari pending, No. 77-1027.

Respondents have not supplied any "concrete factual indication" that there was a distribution, and the evidence in the record makes it unlikely, if not impossible, that a distribution took place. It is time for this case, now in its second decade, to come to an end. Petitioners are entitled to summary judgment.

For these reasons, as well as those discussed in our opening brief, the judgment of the court of appeals should be reversed in part.

Respectfully submitted.

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*Acting Solicitor General.**

FRANK H. EASTERBROOK,
Deputy Solicitor General.

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*The Solicitor General is disqualified in this case.

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